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Supreme Court, U.S.
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No. 05-528

IN THE SUPREME COURT
OF THE UNITED STATES

MAGGIE MILLER-STOUT,

Petitioner,

v.

ERNEST ALLEN BAILEY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Question Presented

Has this Court clearly established that arguments of counsel urging the jury to consider inadmissible out-of-court statements can violate the Confrontation Clause?

TABLE OF CONTENTS

Question Presented i

Opinions Below 3

Jurisdiction 3

Statement 3

Reasons The Petition Should Be Denied 6

1. Introduction 6

2. The Ninth Circuit Based its Decision on Clearly Established Law 7

3. There is No Split in the Circuits 10

Conclusion 13

TABLE OF AUTHORITIES

Cases

Bruton v. United States, 391 U.S. 123 (1968) ..... passim

Donnelly v. DeChristoforo, 416 U.S. 637 (1974) 10

Douglas v. Alabama, 380 U.S. 415 (1965) 9, 10

Griffin v. California, 380 U.S. 609 (1965) 10

Hutchins v. Wainwright, 715 F.2d 512 (11th Cir. 1983), cert. denied, 465 U.S. 1071 (1984) 12

Marsh v. Richardson, 873 F.2d 129 (6th Cir. 1989) 8

Ramdass v. Angelone, 530 U.S. 156 (2000) 8

Teague v. Lane, 489 U.S. 288 (1989) 8

United States v. Molina-Guevara, 96 F.3d 698 (3rd Cir. 1996) 12

United States v. Quintero, 38 F.3d 1317 (3rd Cir. 1994) 11

United States v. Sandini, 888 F.2d 300 (3rd Cir. 1989) 11, 12

United States v. Solis, 299 F.3d 420 (5th Cir. 2002) 11

Williams v. Taylor, 529 U.S. 362 (2000) 9

Wright v. West, 505 U.S. 277 (1992) 8

Yarborough v. Alvarado, 541 U.S. 652, 124 S. Ct. 2140 (2004) 8

Constitutional Provisions

U.S. Const., Amend. 6 (Confrontation) 1, 3, 5

Opinions Below

Petitioner Miller-Stout ("the State") has correctly set out the opinions below.

Jurisdiction

Miller-Stout has correctly invoked this Court's jurisdiction.

Statement

Bailey's codefendant, Eugene Youngblood, gave a lengthy statement to a detective in which he attempted to deflect blame onto Bailey and Orlandis Campbell and away from himself. He claimed that he fled the state after the murders only because he deduced that Bailey and Campbell must have committed the crimes, and he knew he would be suspected because of his close association with them.

Over Bailey's objection, the State offered a redacted statement of Youngblood's that purportedly complied with Bruton v. United States, 391 U.S. 123 (1968), because it removed Bailey's name. Bailey's right to confrontation was violated, however, because the jury was left with no doubt that Youngblood implicated Bailey.

In granting relief, the Ninth Circuit and district court relied primarily on the closing arguments of counsel.[1] In its petition, the State never discusses the content of those arguments. The prosecutors repeatedly argued – at times with the court's approval – that Youngblood's statement incriminated Bailey when linked to other evidence. Youngblood's counsel explicitly argued that her client was talking about Bailey and Campbell when he gave his statement to the detective.

The prosecutors frankly took the position that they could make any linkage they wished between Youngblood's statement and other evidence incriminating Bailey. They were even allowed to show the jury a chart that placed statements of Youngblood side-by-side with various circumstantial evidence against Bailey. For example, they noted that Youngblood admitted picking up guns at a particular location, and then asked the jury to consider that statement alongside testimony that Bailey was with Youngblood at the time.

The prosecutors also used Youngblood's statement to argue that he was an accomplice to Bailey. For example, they noted that Youngblood admittedly "had . . . an assumption" based on the things he heard and saw that his associates would commit murder. When Youngblood lent his car to Bailey after making that assumption, the prosecutors argued, he became a knowing accomplice to murder.

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[1] In a concurrence, Judge Graber also noted that Youngblood's statement was insufficiently redacted.

This indicated that the prosecutors believed Youngblood was referring to Bailey when he spoke of his associates.

Youngblood's attorney began her closing argument by contending that Bailey and Campbell committed the murders. She argued that Youngblood told the detective the truth, that is, that he knew he would be implicated in the murders because he had been seen with Bailey and Campbell and because they had used his car to travel to the murder scene.

> [T]here is no question that after the crime has occurred and Mr. Youngblood learns of it he knows that he's going to be dragged into this thing. *He knows that he's going to be associated with Bailey*.

(emphasis added). Counsel then explained that Youngblood thought he could be found guilty as an accomplice simply because Campbell and Bailey "used his car to commit a crime." Bailey's objection to this line of argument was overruled.

Youngblood's counsel then expressly argued that Youngblood was explaining his connection to Bailey and Campbell when he spoke with the detective. She specifically referred to the portion of the statement in which Youngblood made an "assumption" that the crime would take place based on what his associates were saying and doing. Bailey moved for a mistrial based on this argument, but the motion was denied.

As noted above, a majority of the Ninth Circuit panel found it unnecessary to rely on anything other than the closing arguments in finding a Confrontation

violation. Bailey has a strong argument, however, that the presentation of Youngblood's statement itself incriminated Bailey, or at least aggravated the errors in the closing arguments. First, the prosecutor and lead detective emphasized that the statement proved Youngblood's guilty knowledge because he revealed the names of the perpetrators before the police disclosed them to him or to the press. The jury was told that Youngblood implicated Campbell and at least one other person, and the State's consistent position was that Bailey, Youngblood and Campbell (and nobody else) committed the murders. It would make no sense to argue that Youngblood had inadvertently revealed his guilty knowledge if he had named someone other than Bailey. Second, the jury was told that Youngblood's statement had been altered by the judge's legal rulings, which helped explain why the detective did not expressly name Bailey when he discussed the statement. Third, the awkward nature of the redactions made it obvious that the detective was not reading Youngblood's actual words. Fourth, the jury learned at one point that Youngblood was referring to his "homeboy" (fellow gang member) from "Mansfield," an obvious description of Bailey.

Reasons The Petition Should Be Denied

1. Introduction

The petition fails to state any viable reason for this Court to exercise its discretion to grant review. Supreme Court Rule 10 lists the considerations

relating to granting certiorari. The State never cites to Rule 10 nor expressly argues that any of its considerations apply. To the extent the State suggests that other circuits disagree with the Ninth Circuit's analysis in this case, it is mistaken. See section 3, below.

2. The Ninth Circuit Based its Decision on Clearly Established Law

The State argues that the U.S. Supreme Court has never clearly established that arguments of counsel can cause a Bruton violation. The district court correctly answered that contention as follows:

> It could be argued, perhaps, that the Richardson Court's remarks about the closing argument were *dicta*. But the Court specifically instructed the trial court to consider the issue (and whether it had been waived) on remand.
>
> Furthermore, and in any event, if the Supreme Court-required limiting instruction may be expressly undermined by the prosecutor (or co-defendant's counsel) in closing, it is little more than a magical incantation. The defendant's Sixth Amendment right to confrontation would be rendered meaningless in such a case. This court concludes that the state courts' denial of Bailey's Petition on the basis of the closing arguments was contrary to clearly established federal law, as outlined in Bruton and Richardson.

App. 26a. The district court's analysis was adopted by the Ninth Circuit. App. 2a.

The district court was correct that Richardson specifically found the prosecutor's argument to cause a Confrontation violation. There would have been no point in remanding for consideration of the waiver issue otherwise. It appears that the lower courts understood the Supreme Court decision that way, because

they granted the writ of habeas corpus on remand. See Marsh v. Richardson, 873 F.2d 129 (6th Cir. 1989).

Further, the district court correctly concluded in the alternative that there was no need for a Supreme Court decision explicitly holding that closing arguments could cause a Bruton violation, since that was implicit in the Supreme Court's Confrontation jurisprudence. With "one caveat," AEDPA's standard for "clearly established law" is the same as for an "old rule" under Teague v. Lane, 489 U.S. 288 (1989). See Ramdass v. Angelone, 530 U.S. 156, 165-66 (2000). "The one caveat . . . is that § 2254(d)(1) restricts the source of clearly established law to this Court's jurisprudence." Id. This Court has described the Teague analysis as follows:

> If the rule in question is one which of necessity requires a case-by-case examination of the evidence, then we can tolerate a number of specific applications without saying that those applications themselves create a new rule. . . . Where the beginning point is a rule of this general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent.

Wright v. West, 505 U.S. 277, 308-309 (1992) (opinion concurring in judgment), cited with approval in Yarborough v. Alvarado, 541 U.S. 652, 124 S. Ct. 2140, 2149 (2004). Further, a state court decision may be an unreasonable application of a principle established by the U.S. Supreme Court if the state court "unreasonably

refuses to extend that principle to a new context where it should apply." Williams v. Taylor, 529 U.S. 362, 407 (2000).

As the district court noted, it would be unreasonable to decline to apply Bruton in this situation. Under the State's interpretation of Supreme Court law, there would be no Confrontation violation regardless of how egregiously the prosecutor flouted the limiting instruction, or of how the trial court responded. For example, suppose a prosecutor argued as follows: "Members of the jury, when the codefendant's statement was read to you, it contained a lot of neutral pronouns. But we just put those in because the judge wouldn't let us tell you that he was really referring to the defendant. I'm sure you figured out the truth, and I urge you to use the statement against the defendant." Under the State's view that argument would not clearly violate the Confrontation Clause. In fact, it would be wholly unreasonable to refuse to apply Bruton to that scenario.

In fact, the rule upon which Bailey relies was established even before Bruton. First, in Douglas v. Alabama, 380 U.S. 415 (1965), the Court recognized that a prosecutor's misconduct can cause a Confrontation violation. In Douglas, the codefendant took the stand but refused to answer the prosecutor's questions. The prosecutor then read at length from his purported confession in an effort to refresh his recollection. Id. at 416-17. This violated the Confrontation Clause even though the prosecutor's questions "were not technically testimony." Id. at 419. This Court relied on Douglas in Bruton, 391 U.S. at 126-28.

Second, this Court has long recognized that a prosecutor's closing arguments that infringe on specific constitutional rights are analyzed as violations of those rights, whereas arguments that are merely improper may or may not violate the general right to due process. See Donnelly v. DeChristoforo, 416 U.S. 637, 642-43 (1974). "When specific guarantees of the Bill of Rights are involved, this Court has taken special care to assure that prosecutorial conduct in no way impermissibly infringes them." Id. at 643. For example, a defendant's Fifth Amendment right to remain silent is violated when the prosecutor argues that the jury should infer guilt from silence, even when the jury is properly instructed on this issue. Griffin v. California, 380 U.S. 609, 615 (1965) ("the Fifth Amendment . . . forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt").

Similarly, arguments of counsel that urge the jury to use a nontestifying codefendant's statement against the defendant clearly run afoul of Douglas and Bruton. That is so obvious that this Court found it unnecessary to give the matter an extended discussion in Richardson.

3. There is No Split in the Circuits

The State cites cases from the Third and Fifth Circuits which, it suggests, are inconsistent with the Ninth Circuit's reasoning here. In fact, those cases addressed a different issue from the one involved in this case.

In United States v. Solis, 299 F.3d 420, 441-42 (5th Cir. 2002), codefendant's counsel merely suggested in closing argument that the government may have proved the existence of a conspiracy. He did not rely on any out-of-court statements. Similarly, in United States v. Sandini, 888 F.2d 300, 308-11 (3rd Cir. 1989), defendant Thomson complained about the closing argument of the attorney for codefendant Kost, who implied that Thomson was guilty. But Kost's attorney never suggested that any out-of-court statements should be used against Thomson, and he never sought to undo any limiting instruction. At most, he implied that various evidence properly admitted at trial proved Thomson guilty. Not surprisingly, the Third Circuit found this scenario readily distinguishable from Bruton. Id. at 310-11. The State quotes out of context the court's statement that "Bruton has nothing to do with arguments of counsel." The court was merely explaining that arguments of counsel suggesting that a defendant is guilty do not implicate Bruton. Obviously, prosecutors argue in every case that the evidence proves the defendant guilty, yet their argument does not violate the Confrontation Clause simply because the prosecutors were not cross-examined.

In United States v. Quintero, 38 F.3d 1317, 1341-43 (3rd Cir. 1994), defendant Gonzalez contended that testimony concerning codefendant Morgado's statements, and the arguments of Morgado's counsel, violated his Confrontation rights. The court found no reversible error because the testimony did *not* implicate Gonzalez, and because Gonzalez failed to object to any improper

argument. Id. In the course of this discussion, the court quoted the above-mentioned portion of Sandini. But once again, the court was not dealing with a claim like Bailey's.

By contrast, in a case not cited by the State, the Third Circuit expressly found a Confrontation violation stemming solely from a prosecutor's closing argument. See United States v. Molina-Guevara, 96 F.3d 698 (3rd Cir. 1996). The prosecutor in that case argued that he could have called a particular witness to corroborate the testimony of one of the agents. Id. at 703. "The Confrontation Clause of the Sixth Amendment is violated when a prosecutor informs the jury that there is a witness who has not testified, but who, if he had testified, would have given inculpatory evidence." Id., citing Hutchins v. Wainwright, 715 F.2d 512 (11th Cir. 1983), cert. denied, 465 U.S. 1071 (1984) (prosecutor violated defendant's Confrontation rights by implying in closing argument that an unidentified informant had implicated defendant).

In short, the State cannot find any lower court that has read Bruton and Richardson differently from the Ninth Circuit. No court appears to have questioned that arguments of counsel may "undo" a limiting instruction and thereby raise the same Confrontation concerns expressed in Bruton. Thus, there is no circuit split on the issue presented in this case.

Conclusion

The decision below presents no consideration that fits within the criteria set forth in Rule 10. The petition for writ of certiorari should be denied.

RESPECTFULLY SUBMITTED this 20th day of January 2006.

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NO. 05-528

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MAGGIE MILLER-STOUT,

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v.

ERNEST ALLEN BAILEY,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 2

1. The Rule Applied By The Ninth Circuit Was Not Clearly Established Federal Law. 2

2. The Ninth Circuit's Decision Directly Conflicts With Decisions Of Other Circuits. 6

CONCLUSION 7

TABLE OF AUTHORITIES

Cases

Darden v. Wainwright,
477 U.S. 168 (1986) 5

Donnelly v. DeChristoforo,
416 U.S. 637 (1974) 4

Douglas v. Alabama,
380 U.S. 415 (1965) 4

Faretta v. California,
422 U.S. 806 (1975) 2

Griffin v. California,
380 U.S. 609 (1965) 4

Hutchins v. Wainwright,
715 F.2d 512 (11th Cir. 1983),
cert. denied, 465 U.S. 1071 (1984) 4, 5

Kane v. Espitia,
126 S. Ct. 407 (2005) 1, 2, 3

Richardson v. Marsh,
481 U.S. 200 (1987) 3, 5, 6

United States v. Molina-Guevara,
96 F.3d 698 (3rd Cir. 1996) 4, 5

United States v. Quintero,
38 F.3d 1317 (3rd Cir. 1994) 6

United States v. Sandini,
888 F.2d 300 (3rd Cir. 1989) 6

Williams v. Taylor,
529 U.S. 362 (2000) 2

Statutes

28 U.S.C. § 2254..... 1, 2, 3, 5

INTRODUCTION

Bailey admits the Ninth Circuit affirmed the grant of habeas relief by ruling the closing arguments of the prosecutor and counsel for Bailey's co-defendant violated the Confrontation Clause.[1] Br. Opp. at 4-5. Bailey argues the rule applied by the Ninth Circuit need not be based upon an explicit holding of this Court. Br. Opp. at 8. Bailey argues there was no need for a decision explicitly establishing the rule applied by the lower court because the rule "was implicit in the Supreme Court's Confrontation jurisprudence." Br. Opp. at 8. As this Court recently explained, however, a rule is not clearly established federal law for purposes of 28 U.S.C. § 2254(d) simply because the Court's jurisprudence might imply such a rule. *Kane v. Espitia*, 126 S. Ct. 407, 408 (2005) (*per curiam*). Because the rule applied by the Ninth Circuit was not clearly established by a holding of this Court, it cannot serve as a basis for federal habeas relief. The Court should grant the petition for a writ of certiorari and summarily reverse the decision of the Ninth Circuit Court of Appeals.

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[1] Bailey states the lower court "relied primarily on the closing arguments of counsel" in granting relief. Br. Opp. at 4. Noting Judge Graber's concurring opinion, Bailey suggests the Ninth Circuit also believed the redacted statement itself was improperly admitted in violation of the Confrontation Clause. Br. Opp. at 4 n.1. By adopting the ruling of the district court, however, the majority opinion of the Ninth Circuit determined the statement was properly redacted and the admission of the redacted statement did not in itself violate the Sixth Amendment. The Ninth Circuit affirmed the grant of relief solely on the basis that counsels' arguments violated the Confrontation Clause. App. 2a; *see also* App. 23a-26a. The sole issue before this Court is whether the rule applied by the Ninth Circuit is based upon a holding of this Court.

ARGUMENT

1. The Rule Applied By The Ninth Circuit Was Not Clearly Established Federal Law.

"A necessary condition for federal habeas relief here is that the state court's decision be 'contrary to, or involv[e] an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'" *Kane v. Espitia*, 126 S. Ct. at 408 (quoting 28 U.S.C. § 2254(d)(1)). Clearly established federal law "refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412 (2000). If the opinion relied upon by the lower federal court does not clearly establish the specific right asserted by the habeas petitioner's claim, an alleged violation of that right cannot be a basis for federal habeas relief. *Kane*, 126 S. Ct. at 408.

In *Kane*, the Ninth Circuit found the lack of pretrial access to law books violated Espitia's right to self-representation under *Faretta v. California*, 422 U.S. 806 (1975). *Kane*, 126 S. Ct. at 408. The Ninth Circuit found that *Faretta*, although not expressly establishing the right in a holding, implied a right of the pro se defendant to have access to a law library. *Id.* Reversing the Ninth Circuit, this Court explained the question of whether the right to self-representation established in the holding of *Faretta* also carried with it an implied right to legal aid could not be resolved in a habeas proceeding. *Id.* While a lower court may believe an implied right logically flows from an express holding of the Court, such an implied right cannot serve as a basis for habeas relief under 28 U.S.C. § 2254(d)(1). *Id.*

By adopting the district court's reasoning, the Ninth Circuit affirmed the grant of habeas relief by relying on two sentences in *Richardson v. Marsh*, 481 U.S. 200, 211 (1987). App. 2a; App. 23a-26a. The two sentences in *Richardson* directed the Sixth Circuit to consider in the first instance whether a prosecutor's comments "can serve as the basis for granting a writ of habeas corpus" in light of the defendant's failure to object. *Richardson*, 481 U.S. at 211. This language in *Richardson*, however, was not a holding of the Court, and it did not clearly establish the rule applied by the Ninth Circuit. As in *Kane*, the Ninth Circuit in this case applied a rule that was not clearly established.

Bailey argues the language in *Richardson* necessarily implies that the prosecution's arguments violated the Confrontation Clause. Br. App. at 8-10. An implicit rule cannot serve as the basis for granting habeas relief. *Kane*, 126 S. Ct. at 408. Rather, the rule must be clearly and explicitly established for purposes of 28 U.S.C. § 2254(d). *Id.* More importantly, even assuming the two sentences in *Richardson* imply the prosecutor's comments may have caused some constitutional error, *Richardson* does not clearly establish that the arguments of counsel violate the Confrontation Clause. At most, *Richardson* vaguely implies the existence of some constitutional error, such as a possible due process violation under the Fourteenth Amendment based upon prosecutorial misconduct. Contrary to Bailey's argument, *Richardson* did not hold that counsels' arguments violate the Confrontation Clause. The vague reference in *Richardson* to a potential constitutional error is not sufficient to clearly establish the rule applied by the Ninth Circuit.

Bailey cites to three of this Court's opinions to argue his claim is based upon clearly established federal law. Br. Opp. at 9-10. None of these cases clearly establish the rule applied by the Ninth Circuit. *Douglas v. Alabama*, 380 U.S. 415 (1965) did not involve the comments of counsel made during closing argument. Rather, *Douglas* involved a prosecutor reading to the jury, in the guise of cross-examination, the detailed confession of a witness who exercised his Fifth Amendment right to remain silent. *Id.* at 416-18 & n.1. The prosecutor would read a lengthy portion of the statement, and then ask the witness whether he had made the statement. *Id.* Despite Alabama's characterization that the statement was not "technically testimonial," *Douglas* clearly involved a presentation of evidence during the case-in-chief, and not merely the closing arguments of counsel. *Douglas* did not clearly establish the rule applied by the Ninth Circuit. Similarly, while *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974) and *Griffin v. California*, 380 U.S. 609 (1965) involved comments of the prosecutor during closing argument, neither case involved the Confrontation Clause. *Donnelly* involved the Fourteenth Amendment Due Process Clause, and *Griffin* involved the Fifth Amendment Self-Incrimination Clause. Neither case held that counsels' closing arguments may violate the Confrontation Clause. *Donnelly* and *Griffin* did not clearly establish the rule applied in this case.

Bailey also cites *United States v. Molina-Guevara*, 96 F.3d 698 (3rd Cir. 1996) and *Hutchins v. Wainwright*, 715 F.2d 512 (11th Cir. 1983), *cert. denied*, 465 U.S. 1071 (1984) to argue the rule applied by the Ninth Circuit was clearly established

in *Richardson*. Br. Opp. at 12. However, the circuit courts in *Molina-Guevara* and *Hutchins* were not bound by 28 U.S.C. § 2254(d)(1). Moreover, neither case is an example of a court applying the rule allegedly established in *Richardson* since neither case involved a *Bruton* issue. In fact, *Hutchins* cannot be cited as an example of a court applying the rule allegedly established in *Richardson* since *Hutchins* was decided several years before *Richardson*.

Bailey argues that unless the Confrontation Clause applies, a prosecutor may be free during closing argument to flout the limiting instructions and to tell the jury to apply the redacted statement against the defendant. The parade of horribles envisioned by Bailey will not come to be. The Due Process Clause protects against such improper and egregious closing arguments. *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). Bailey, however, intentionally chose not to raise a due process challenge to counsels' argument in his federal petition. Bailey chose to pursue only a violation of the Confrontation Clause. Because the actual claim asserted in this habeas proceeding is not based upon clearly established federal law, 28 U.S.C. § 2254(d) bars a grant of habeas relief.

In this case, Bailey never asserted a violation of due process. Instead, Bailey pursued only a Sixth Amendment confrontation claim. Because this Court has never established that closing arguments, as opposed to testimonial evidence, may violate the Confrontation Clause, the rule applied by the Ninth Circuit is not based upon clearly established federal law for purposes of 28 U.S.C. § 2254(d)(1).

2. The Ninth Circuit's Decision Directly Conflicts With Decisions Of Other Circuits.

Bailey unsuccessfully attempts to argue the Ninth Circuit's decision does not conflict with the decisions of other circuit courts. Br. Opp. at 10-12. In *United States v. Sandini*, 888 F.2d 300 (3rd Cir. 1989), the Third Circuit directly addressed the claim that arguments of co-defendant's counsel can violate the Confrontation Clause.[2] The Third Circuit rejected the alleged *Bruton* error, explicitly stating it has "never held that *Bruton* applies when the attorney for a codefendant implicates a defendant during a closing argument and we perceive of no reason to do so because the arguments of counsel simply are not evidence." *Id.* at 310-11. The Third Circuit reaffirmed this ruling in *United States v. Quintero*, 38 F.3d 1317, 1342 (3rd Cir. 1994), holding *Bruton* "does not apply when an attorney for a co-defendant implicates the defendant during closing argument." The Third Circuit's opinions in *Sandini* and *Quintero* directly conflict with the Ninth Circuit's decision that the closing arguments violated Bailey's rights under the Confrontation Clause.

The Ninth Circuit improperly expanded the holding of *Richardson* beyond the rule clearly established by this Court. In doing so, the Ninth Circuit issued an opinion which directly conflicts with the opinions of other circuit courts. Because the Ninth Circuit applied a rule that was not clearly established

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[2] In Bailey's case, the alleged error was not based solely on the arguments of the prosecutor. In fact, the lower courts found the arguments of co-defendant's counsel were the most egregious in allegedly linking Bailey to the redacted statements. App. 2a and 25a-23a.

federal law, the Court should grant the petition and reverse the decision of the Ninth Circuit.

CONCLUSION

For the reasons stated herein the petition should be granted and the decision below should be summarily reversed.

RESPECTFULLY SUBMITTED,

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